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REFLECTIONS ON LABOR, POWER, AND SOCIETY

JAMES B. ATLESON*

This Essay focuses upon the role of power in certain areas of labor law and society. I will primarily analyze the impact upon labor of the increasing concentration of capital and the role of the law in ignoring or thwarting union efforts to equalize bargaining power. In addition, as a specific example of concentration, I will discuss the impact on labor of the control of the means of communication and the narrowing of the permissible range of political discourse. My critical assumption is that both labor and society are affected by the same social and economic forces, and, thus, current social problems are reflected in the stuff of ordinary labor law.

A key economic and social phenomenon in the United States is the concentration of wealth and economic power in fewer hands, a development that has become compounded by the general reluctance in American society to acknowledge or discuss issues of economic or political power.¹ Significant changes have occurred in capital and corporate structure that profoundly affect American society and, as far as labor relations are concerned, seriously undermine the assumptions² underlying federal labor policy. The "law talk" in cases increasingly assumes that labor has arrived as, if not

* Professor of Law, State University of New York at Buffalo. This paper was presented at the University of Maryland School of Law's Labor Relations Program on September 21, 1984. I would like to thank Eileen Silverstein and my colleagues who have dutifully toiled over earlier drafts of this paper, especially Fred Konefsky, Rob Steinfeld, and Bill Greiner. The ideas, of course, are my own.

1. Richard Adams has noted that Americans are uncomfortable with notions of power inequality. His explanation, however, seems unconvincing: The discomfort exists "because of our long emphasis on the fundamental legal equality of man under [our Constitution]." Adams, *Power in Human Societies: A Synthesis*, in *THE ANTHROPOLOGY OF POWER* 387, 409 (R. Fogelson & R. Adams eds. 1977). For a strong statement on the need to study inequalities of power, see Nader, *The Recurrent Dialectic Between Legality and its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621 (1984) (reviewing J. AUERBACH, *JUSTICE WITHOUT LAW?* (1983)). Nader criticizes Auerbach's examination of different modes of dispute resolution for failing to focus on power inequalities. *Id.* at 639-40.

2. The most commonly asserted justification for the National Labor Relations Act (NLRA) was that it would lessen industrial conflict. In addition, the economy would be strengthened by independent unions, which would insist upon a more equitable division of profits, thereby maintaining purchasing power. Industrial democracy, vaguely defined, would provide joint determination through collective bargaining and, in addition, deepen the roots of political democracy. Yet the most important theme in all of Senator Wagner's speeches was that the Act would effect a greater economic stability through

an equal, at least a substantial equalizer to capital. Such talk is painfully ironic today and has always been mythical. Legal discussions of economic weapons and alleged "balancing of interests" tend not to focus upon changes in corporate or capital structure. These matters, largely ignored by both legal writers as well as legal decisionmakers, tend to be left to professionals in other fields. For some reason there is a general reluctance or unwillingness in law to talk about or even recognize problems of capital structure and, indeed, power itself.

Concededly, economic forces do not exist apart from legal regulation, and I do not mean to suggest that there are clear boundaries between economic or social trends and legal regulation. The forces leading to concentration of wealth or the motivation for the conglomerate form of organization, for instance, are obviously affected, encouraged, or shaped by the existing state of the law. Recognizing this fact, however, does not weaken the perception that writing in labor law tends overwhelmingly to stress doctrinal, rather than economic, sociological, or historical forces. Although I think the existing body of rules often has less effect on society than lawyers tend to believe, I do not want to slight the impact and symbolic value of legal rules. Thus, it is important to emphasize that the law itself both restricts the attempts by unions to enlarge or equalize bargaining power and restrains the scope and the allowable expression of the worker community. Legal decisions generally ignore, at least outwardly, changes in corporate structure, but, at the same time, the laws of coordinated bargaining, secondary boycotts, and worker communication are significant obstacles to union attempts to alter imbalances of power.

I. CAPITAL CONCENTRATION AND COLLECTIVE BARGAINING

The growth of conglomerates and multi-national corporations (MNCs) drastically affects the power relationships of labor and capital. Unions find themselves dealing increasingly with conglomerates and multi-national corporations that can more easily weather economic struggles, conceal information, and transfer, or more credibly threaten to transfer, work to other locals or, indeed, other countries, than could their predecessor counterparts. This drastic change in corporate and capital structure mandates a rethinking of our labor laws.

There is considerable irony in the fact that when a union seeks to cooperate with other unions facing the same employer, or tries to put economic pressure on nonstruck parts of a conglomerate, the union is told that the NLRA bars its attempts to try to equalize bargaining power. The basic assumption in coordinated bargaining cases seems to be that unions whose members are employed by a MNC or a conglomerate—for instance, locals of the Oil, Chemical & Atomic Workers Union (OCAW), locals at Shell Oil, or the various unions dealing with Phelps Dodge or General Electric—do not have a sufficient community of interest, despite their own desire, to seek joint protection and strength. The law, of course, limits the worker community and its range of acceptable concerns in a variety of ways. For example, restrictions on various forms of self-help, such as slow-downs and wildcat or sympathy strikes, limit the ways in which the worker community can express itself. In addition, limitations on the scope of collective bargaining affect the allowable range of community concern. One focus of this Essay is on the law of coordinated bargaining and secondary boycotts which limits the extent to which the worker community can protect itself against corporate structures that drastically alter power relationships.

Changes in corporate structure since the early 1950's have affected collective bargaining's potential for equalizing economic power or encouraging industrial democracy. Such concentration was obviously not a major concern when the Wagner Act was passed in 1935. Since the Act's passage, capital has increasingly become highly mobile, and it is commonplace to note that international corporations disregard national as well as state boundaries. Moreover, "[w]hile plants are decentralized across national boundaries, there is increasing centralization of control among fewer corporations."³ Automobiles are a good example—the number of car manufacturers has been substantially reduced; this decline will apparently continue and joint ventures among "competitors" in different countries have become common.

The conglomerate form, which may or may not be transnational, is the result of corporate diversification in which the parent acquires firms that produce unrelated goods or services.⁴ The goal

3. See S. ARONOWITZ, *WORKING CLASS HERO* 4 (1983).

4. Craypo, *Collective Bargaining in the Conglomerate, Multinational Firm: Litton's Shut-down of Royal Typewriter*, 29 *INDUS. & LAB. REL. REV.* 3, 4 (1975) [hereinafter cited as Craypo, *Collective Bargaining*]. Litton Industries, for instance, when studied as long ago as 1969, engaged in business activity extending over seventeen separate product lines in four unrelated industry groups (business systems and equipment; defense and marine

often expressed by conglomerate managers is to "achieve unrelated diversification and large size in order to balance sales and profits among the diverse product lines as a hedge against deterioration in a single line and in the interest of greater overall stability and performance."⁵ "Deterioration" encompasses union organization and labor conflict as well as economic downturns.

Two distinct features of MNCs⁶ distinguish them from conglomerates. First, "transnational corporations transact a sufficiently large amount of business abroad so that their financial status is dependent upon operations in several countries."⁷ Second, management tends to make decisions on the basis of multi-national, not national, alternatives.⁸ Studying firms with both a high degree of

systems; industrial systems and equipment; professional services and equipment). "In the United States alone, there are more than one thousand manufacturing, research, sales and service workplaces within the Litton complex." Craypo, *Workers in Common Predicament: Labor Education in an Era of Conglomerate, Multinational Enterprise*, 1976 LAB. STUD. J. 5 [hereinafter cited as Craypo, *Labor Education*]. A firm like General Electric may look like Litton—it did business in five separate product lines—but nearly all of its business is limited to electrical and electronic equipment. Moreover, Litton is noteworthy for its balance among unrelated activities—"no single product line accounted for more than 13 percent of Litton's annual sales during 1967-69." Craypo, *Collective Bargaining*, *supra*, at 5.

5. Craypo, *Collective Bargaining*, *supra* note 4, at 5.

6. Information on multi-national corporations is scattered, and data on conglomerates seem even harder to find. Much of the data I rely upon may well be out of date, but there is no doubt that concentration has, if anything, increased substantially. "Total assets of U.S. MNC's grew at an annual rate of 11.1 percent from 1966 to 1977. By 1977, assets had more than tripled—from \$624.2 billion to \$1,986.6 billion . . . and [t]he number of U.S. MNC's increased only 4 percent—from 3,299 in 1966 to 3,425 in 1977." Howenstine, *Growth of U.S. Multinational Companies, 1966-77*, 62 SURV. OF CURRENT BUS. 34, 34, 35 (1982). It is startling to realize that of the 100 largest economic units in the world, 50 are nation states and 50 are MNCs. Macrae, *The Future of International Business*, ECONOMIST, Jan. 22, 1972, at 21, cited in INTERNATIONAL LABOUR OFFICE, MULTINATIONAL ENTERPRISES & SOCIAL POLICY 4 (1973). As long ago as 1971, Barnet and Miller observed that the "largest U.S.-based global firms, such as Ford, ITT, Chrysler, Kodak and Proctor & Gamble, employ more than one-third of their workforce outside the United States." R. BARNET & R. MILLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS 303 (1974). A 1981 study of the International Labor Organization found that MNCs employed forty million workers in the "market economy countries." In the mid-1970's, three in every nine employees in manufacturing in these countries worked for MNCs, amounting perhaps to thirty million people. ILO Study Analyzes Relationship of Multinationals and Jobs, John Herling's Labor Letter, Aug. 15 & 22, 1981, at 3, col. 1.

7. Hadari, *The Structure of the Private Multinational Enterprise*, 71 MICH. L. REV. 729, 742-43 (1973).

8. *Id.* at 743 (quoting G. STEINER, THE NATURE AND SIGNIFICANCE OF MULTINATIONAL CORPORATE PLANNING 1, 6 (G. Steiner & W. Cannon eds. 1966)). As Roger Blainpain notes, MNCs tend to argue that labor problems must be dealt with on the local level, whereas unions seek to negotiate at the transnational level, the level at which important decisions are made. Blainpain, *Transnational Regulation of the Labor Relations of*

unrelated business activity and substantial multi-national integration of production within particular product lines, Charles Craypo found that in 1973 at least fifteen percent of the leading 300, including eight of the top fifty, firms in American manufacturing were conglomerate, multi-national employers.⁹

The ability of corporate managers to transfer capital and production to other locations and to weather economic struggles has drastically affected the viability of collective bargaining. MNCs tend to engage in centralized decisionmaking and routinely threaten to transfer production to other locales, unorganized plants, or to other parts of the globe. If a strike occurs in one location, the loss suffered may be insignificant with respect to the total operation of the firm. Moreover, relevant decisionmaking often occurs at the MNC's headquarters, beyond the reach of the union concerned. Subsidiaries of Litton, for instance, are centrally managed; operational goals and standards are set at the top. Day-to-day operations are left to low level managers, but are restricted by the parameters established at corporate headquarters.¹⁰ To a significant extent, however, MNCs must obviously adapt to the major features of the various labor relations systems in which they operate.

Corporate structures become relevant to the law when unions attempt to engage in coordinated bargaining with MNCs, conglomerates, or simply with large, multi-operation firms. Unions that bargain with large, multi-location employers—either locals of the same international union¹¹ or of different internationals¹²—often seek to enlarge the scope of bargaining. Often, one aim of the union is to protect against whipsawing, a practice in which an employer plays one union or local off another. An employer who bargains with many unions, for instance, may seek to secure a collective agreement with a relatively weak union, relying upon such a settlement as

Multinational Enterprises, 58 CHI.-[KENT L. REV. 909, 912 (1982). Blainpain states that the international "trade unions have not succeeded in pushing the multinational enterprises to the transnational bargaining table." *Id.* It is not clear, however, that the effort has been serious or sustained. Both management resistance and union reluctance arising from the unions' ideological diversity, lack of manpower, and opposed interest seem to stand as substantial obstacles. *Id.* Another strategy would be for multi-state organizations to advocate legislative changes. Some multi-national guidelines exist and others have been proposed by multi-state agencies, such as the ILO, OECD, UN and the European Community. *Id.* at 913.

9. Roughly 15% of the next 50 corporations also fit the definition, as well as 28 of the next largest 150. Craypo, *Collective Bargaining*, *supra* note 4, at 7.

10. Craypo, *Labor Education*, *supra* note 4, at 5-6.

11. For example, Shell Oil Corporation.

12. For example, General Electric Company and Phelps Dodge Corporation.

a pattern-setting model for stronger unions.¹³ At other times, unions seek to deal directly with the actual decisionmakers and try to offset the employers' advantages stemming from multi-unit bargaining. There are only a handful of these cases,¹⁴ and the courts seem at a loss to deal intelligently with or even define the problem. In most cases, courts treat union pressure to expand the bargaining structure as part of the mandatory/permissive distinction employed in analyses of NLRA sections 8(a)(5) and 8(b)(3).

The obligation to bargain is traditionally extended only to matters that are included in the "wages, hours, and other terms and conditions of employment" phrase of NLRA section 9(a).¹⁵ Terms falling within the scope of the statutory obligation are deemed "mandatory"; those that do not are referred to as "permissive." In brief, mandatory terms may be insisted upon, even to the point of creating a bargaining impasse, and no party can refuse to discuss such a term. Permissive terms, in contrast, may be discussed, but neither party can insist upon such a term's inclusion in the agreement nor demand that the other party even consider it. Although any brief summary is potentially misleading, courts and the NLRB have generally tried to analogize the disputed matter to some term or condition of employment clearly within the statutory language or have looked for some clear effect upon wages, hours, or other conditions of employment.¹⁶

Aside from analytical line drawing problems, the mandatory/permissive distinction has little meaning when applied in a coordinated bargaining context. Thus, an attempt to secure a coordinated bargaining structure is not a bargaining or contractual term to be included in a collective agreement but, instead, is an attempt to alter the structure of bargaining and the existing balance of power. It is occasionally argued that coordinated arrangements by unions necessarily mean that the union is compelled to condition its agreement on terms acceptable to other unions or on similar or simultaneous

13. General Electric, for instance, has in the past attempted to bypass the IUE and deal directly with more compliant locals or to settle first with one of its many small unions. See *NLRB v. General Elec. Co.*, 418 F.2d 736 (2d Cir. 1969).

14. *Joint Negotiating Comm. v. NLRB*, 459 F.2d 374 (3d Cir.), *cert. denied*, 409 U.S. 1059 (1972); *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969); *Standard Oil Corp. v. NLRB*, 322 F.2d 40 (6th Cir. 1963); *U.S. Pipe & Foundry Co. v. NLRB*, 298 F.2d 873 (5th Cir.), *cert. denied*, 370 U.S. 919 (1962); *Shell Oil Corp.*, 194 N.L.R.B. 988 (1972), *petition for review denied sub nom. Oil, Chem. & Atomic Workers v. NLRB*, 486 F.2d 1266 (D.C. Cir. 1973).

15. 29 U.S.C. § 159(a) (1982).

16. See generally J. ATLESON, *supra* note 2, at 111-35.

settlements reached elsewhere. This may be true, but it is not at all clear why this is not properly a decision for unions to make as part of evaluating their own long-term goals.¹⁷

The use of ill-fitting categories, a sort of "hardening of the categories," clouds the analysis of courts facing union attempts to coordinate bargaining. The Third Circuit's decision in *Joint Negotiating Committee v. NLRB (Phelps Dodge)* illustrates the analytical problems with the categorical approach. The Third Circuit, in a decision that goes the furthest in permitting union attempts to coordinate bargaining power, overturned the Board's finding that the unions had unlawfully attempted to engage in company-wide bargaining beyond the scope of the established bargaining units.¹⁸ The unions had demanded a limited no-strike provision that focused on the existence of settlements elsewhere; a "most favored nations" type clause;¹⁹ common expiration dates;²⁰ and simultaneous settlements of all contracts by unions in the consortium.²¹ The first two demands were abandoned fairly early in the negotiation, and the court basically approved the remaining union demands, holding that unlawful intent to achieve a nonmandatory goal could not be inferred from the unions' demands.²²

The result of the *Phelps Dodge* case is to permit unions considerable freedom to coordinate efforts, especially if unions take care *not* to agree in any one negotiation until agreement is reached everywhere else. The decision, in effect, comes close to permitting an expansion of the unit for bargaining. Therefore, it is difficult to

17. I understand that there are areas in which union self-interest is not a shield. See, e.g., *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616 (1975) (unions not exempted from antitrust laws when they seek to impose direct restraints on competition among those who employ their members); *UMW v. Pennington*, 381 U.S. 657 (1965) (antitrust policy clearly restricts employer-union agreements seeking to set labor standards outside the bargaining unit).

18. *Joint Negotiating Comm. v. NLRB*, 459 F.2d 374, 377-78 (3d Cir.), cert. denied, 409 U.S. 1059 (1972).

19. *Id.* at 376.

20. *Id.* Such a goal had already been approved in *U.S. Pipe & Foundry Co. v. NLRB*, 298 F.2d 873, 878 (5th Cir.), cert. denied, 370 U.S. 919 (1962), in which unions in separate plants of one employer were permitted to insist on contracts with common expiration dates.

21. *Joint Negotiating Comm.*, 459 F.2d at 376.

22. The Board had also held the demands to be mandatory, but ruled that the unions had an improper intent, that is, they sought company-wide bargaining, a goal which the NLRB and the court believed to be not mandatory. *Operating Eng'rs, Local 428*, 184 N.L.R.B. 976-77 (1970). The court reversed the Board, but agreed that the demands were mandatory, a conclusion it withdrew and assumed without deciding upon reconsideration. *Joint Negotiating Comm.*, 459 F.2d at 378.

fathom the court's assumption that an honest *demand* by unions to bargain together violates the act. Doctrinally, notions of bad faith fit poorly here, as does the Board's attempt to rely upon intent when all demands are mandatory.

The focus upon union *intent* derives from cases in which various unions, sometimes internationals and their locals, attempted to expand a bargaining committee to include representatives of other unions or locals not involved directly in the particular negotiation. The courts applied the normal rule that employees generally may choose whomever they wish to represent them. Each case made clear, however, that the doctrine would only be applied "[a]bsent any finding of bad faith or ulterior motive on the part of the Unions."²³ To use the awkward doctrinal categories, demands such as the desire for common expiration dates and simultaneous settlements, which may affect other bargaining units, are usually deemed mandatory, but seeking an enlargement of the unit in which bargaining had previously occurred will be unlawful since the goal will be deemed nonmandatory. The statement of the legal results clearly reveals the shortcomings of using the available legal categories to analyze union efforts to enlarge the scope of bargaining.

The basic question is why is such a desire or intent unlawful itself? Unions are not seeking to broaden "appropriate bargaining units,"²⁴ nor are they attempting to represent employees in an undemocratic manner; they are, rather, simply attempting to combine existing bargaining units to bargain for otherwise allowable demands. In many cases bargaining has begun without any NLRB intervention at all and, of course, without any NLRB determination of an appropriate bargaining unit. If an employer refuses to recognize and bargain with a union claiming majority status, the union may well file a petition for an election. Even here, the parties may privately agree upon the election unit in a "consent-election agreement." Thus, even if the "integrity" of NLRB unit determinations were somehow relevant, some cases would involve bargaining situations in which there had never been NLRB determination of the appropriate unit.

23. *Standard Oil Co. v. NLRB*, 322 F.2d 40, 44 (6th Cir. 1963). See also *General Elec. Co. v. NLRB*, 412 F.2d 512 (2d Cir. 1969) (violation for employer to refuse to bargain when confronted by an IUE bargaining team consisting in part of representations of other unions). The presence or absence of unlawful intent is difficult to determine; the Board and Third Circuit differed in the finding of unlawful intent in the *Phelps Dodge* case. *Joint Negotiating Comm.*, 459 F.2d at 377-78.

24. An "appropriate bargaining unit" is one in which the election unit is determined either by the parties or the NLRB when a union representation election is held.

Most important, once a union gains representational rights within an *election* unit, the NLRB is indifferent to the actual form and scope of the actual *negotiating* unit. Although the efficacy of collective bargaining is cited as one of the grounds for determining "an" appropriate unit, the NLRB generally does not regulate the actual unit in which bargaining takes place. Indeed, most employees covered by collective agreements seem to be in bargaining units composed of many, separately certified, election districts. Thus, the units in which actual bargaining occurs are generally unrelated to Board-determined election units.²⁵

In large part, market and institutional forces determine the actual negotiation unit and the NLRB tends to accept the units that the parties create.²⁶ Once created, the Board tends to preserve and protect the *actual* bargaining structure from craft severance petitions,²⁷ decertification petitions,²⁸ or from unit clarification petitions.²⁹ Thus, petitions concerning units originally determined to be "appropriate" by the NLRB will be dismissed when the actual structure involves the consolidation of separately certified units.³⁰ Moreover, insistence upon multi-unit bargaining is proper when

25. I have no current statistics, but since the 1961 Bureau of Labor Statistics study, with the exception of the recent recession, concentration seems only to have increased. The BLS study examined 1733 contracts that individually covered 1000 employees or more. These contracts accounted for only 1.2% of an estimated United States total of 150,000, but they involved approximately *half* of all workers covered by collective agreements. According to Arnold Weber, "there was a high concentration of workers in a very small proportion of . . . [bargaining] units." Weber, *Stability and Change in the Structure of Collective Bargaining*, in CHALLENGES TO COLLECTIVE BARGAINING 25 (L. Ullman ed. 1967). Of the 1733 agreements, one-third involved multi-plant single employer units, while 28% were single plant units.

Given the stress on protecting the "integrity" of the Board's appropriate bargaining unit decisions, it is critical to note that multi-employer agreements represented 36% of the agreements studied by BLS and covered 47% of the workers. As Weber concludes, "bargaining structure is dominated by multi-plant agreements in manufacturing and multi-employer contracts in non-manufacturing." *Id.*

26. *Id.* at 13.

27. For examples of Board denial of craft severance petition, see Boise Cascade Corp., 238 N.L.R.B. 1022, 1023 (1979), Motor Wheel Corp., 234 N.L.R.B. 358, 361 (1978), and Bendix Corp., 227 N.L.R.B. 1534, 1539-40 (1977), applying the *Mallinckrodt* doctrine. See generally J. ATLESON, R. RABIN, G. SCHATZKI, H. SHERMAN & E. SILVERSTEIN, COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT 137-40 (2d ed. 1984) [hereinafter cited as COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT].

28. Mar-Jac Poultry Co., 136 N.L.R.B. 785, 786-87 (1962) (employer required to honor certification for one year).

29. For examples of Board denials of clarification petitions to expand a bargaining unit, see Southern Cal. Water Co., 241 N.L.R.B. 771, 773 (1979); Libbey-Owens-Ford Co., 189 N.L.R.B. 869, 869 (1971), *rev'd on other grounds*, 463 F.2d 31 (3d Cir. 1972).

30. See generally R. GORMAN, BASIC TEXT ON LABOR LAW 76-82 (1976).

there is a history of such bargaining, even though the unit is composed of units that were separately certified as appropriate units.³¹ These results undermine the possible argument that the basis for the rulings in coordinated bargaining cases is the protection of employee choice or the "integrity" of the Board's unit determinations. Most important, employers often *agree* to multi-unit or multi-union structures³² when it is in their interest to do so, and it simply is not clear why unions cannot use pressure to achieve such a result. This is an especially odd result in labor law in which an employer's recognition of a union in response to lawful primary or secondary pressure is deemed "voluntary."

The absolutely critical fact is that expansion of bargaining can be done legally if the employer (or employers) agree. If so, then the union goal in coordinated bargaining cases is not, by itself, inconsistent with the Act or its policies. Like many questions in labor law, problems tend to focus upon either the means or the ends sought to be achieved. The question is, why are union attempts to seek a more effective bargaining structure deemed inconsistent with the NLRA, when such a structure can lawfully result from employer and union consent?

While the rationale is unclear, it is fairly certain that an explicit demand to merge separately bargaining locals or unions is improper, and that the employer may refuse to acknowledge such a demand. This issue, assumed in prior decisions, was explicitly determined by the Board in *Shell Oil Co.*³³ Shell had implemented a variety of company-wide fringe benefit plans which were not part of any collective bargaining agreement and which apparently could be modified at any time. In 1968 Shell notified union locals that it was proposing changes in four existing fringe benefit plans. The

31. See *Smith Steel Workers v. A.O. Smith Corp.*, 420 F.2d 1, 11 (7th Cir. 1969) ("The previous history of bargaining in the firm and the industry is also relevant" in determining the appropriate unit.). But see *William J. Keller, Inc.*, 198 N.L.R.B. 1144, 1144-45 (1972) ("[T]he Board is reluctant to disturb a . . . unit based on a satisfactory bargaining history . . . [but] will not give controlling weight to bargaining history to the extent that it departs from statutory provisions or clearly established Board policy concerning the composition and scope of bargaining units.").

32. Cf. *United Paperworkers Int'l Union, Local 1027*, 216 N.L.R.B. 486 (1975) (sixteen-year practice of multi-plant pension negotiations unilaterally ended by employer). The Board rejected the dissenter's contention that once consent to multi-unit bargaining is withdrawn, the "arrangement is no longer mutual and voluntary." *Id.* at 488 (Kennedy, dissenting).

33. 194 N.L.R.B. 988 (1972).

OCAW, representing some 6000 Shell employees in nineteen separate bargaining units,³⁴ offered counter proposals and requested joint bargaining for all nineteen units. The employer agreed to only local meetings and the union filed a section 8(a)(5) charge alleging a refusal to bargain. The union's effort to broaden the scope of bargaining failed despite its contentions that Shell traditionally followed a policy of centralized decisionmaking³⁵ and uniformly implemented the fringe benefit plans, which were, as they had been in the past, identical for all nineteen units. Furthermore, all OCAW-represented employees in each of the separate units were covered by the same plans.

The trial examiner's opinion, one of the most thorough on this issue, acknowledged that "[i]t does seem sensible, reasonable, and just" that Shell, which centrally determines its proposals and presents them in a uniform manner, should be required to bargain with all OCAW unions at the same time.³⁶ Such a format would provide "more meaningful bargaining than can take place at the individual unit level."³⁷ Reading that the union's goal was reasonable and just must have sent forebodings of defeat to the union's counsel. Sure enough, despite the practical sense of having employer representatives close to the actual decision-making process take part in the negotiations, the trial examiner held that "equitable considerations" had to stand aside in favor of a rule that barred any attempt "to force upon the [employer] an enlargement, alteration or merger of an established unit or units."³⁸ Instead, the examiner reasoned, "stability" requires adherence to existing units unless both sides voluntarily agree to the enlargement.³⁹ "Stability" or "integrity," when used in labor law, do not necessarily carry inherent meaning, nor are they sufficient justification for a particular result. Instead, they are like the many "of course" phrases found in Supreme Court decisions—they tell us where the ghosts are buried, but not necessarily who the ghosts are.

Although *both* parties in *Shell* stipulated that on every other occasion the employers' proposed benefit plan changes were either accepted without modification or were implemented after impasse,⁴⁰

34. *Id.* at 989.

35. *Id.* at 990-92.

36. *Id.* at 995.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 990.

the trial examiner stressed that *other* terms of employment vary significantly from unit to unit.⁴¹ Thus, an enlarged bargaining structure would prevent Shell "from trading off, on a selective individual unit basis, concessions in other areas that it might be willing to yield to one or more, but not all, the separate units in exchange for acceptance of its benefit plan proposals."⁴² The trial examiner failed to treat the union's loss of freedom to seek a company-wide bargaining unit as a matter for union determination and deemed unimportant the fact that "trading off" had *never* occurred. The trial examiner relied upon the OCAW's apparent concession that the nineteen units could not be combined into an appropriate bargaining unit because of geographic separation and differences in services performed and products produced.⁴³ Furthermore, the examiner emphasized that labor relations, at least to some extent, were handled locally and that there were significant differences in wages, hours, and working conditions among the various units. But the issue, of course, was not whether the bargaining structure the union desired was an appropriate bargaining unit for election purposes; instead, the issue was whether the union could attempt to obtain a company-wide bargaining structure for dealing with company-wide fringe benefit plans.

I admit confusion here—why not let "freedom of contract," sometimes trumpeted by the Court, govern this case, since the goal of joint bargaining for all nineteen units was not per se unlawful? That is, why not permit the union to attempt to strengthen its position so that it could achieve greater parity with the employer? The result is especially odd because in two of the major cases,⁴⁴ involving Shell Oil and General Electric, the employers had in effect coordinated *their* bargaining by providing uniform proposals to each local or each union. It is certainly strange to use a statute said to be designed, at least in part, to equalize bargaining power, to restrict unions when they seek to ameliorate imbalances in power.

The need for unions to deal with changes in bargaining structure is nowhere clearer than in situations involving multi-national or conglomerate employers. Except for the quite significant transferability of production, capital, and information to other nations, the problems of unions dealing with conglomerates are similar to

41. *Id.* at 996.

42. *Id.*

43. *Id.*

44. *General Elec. Co. v. NLRB*, 412 F.2d 512, 514 (2d Cir. 1969); *Shell Oil Corp.*, 194 N.L.R.B. 988, 988-89 (1972).

problems of dealing with MNCs. Any large employer that has been able to avoid complete unionization, can engage in decentralized (but internally centralized) bargaining, and is, perhaps, structured horizontally, is in a powerful position in relation to unions that represent only a portion of the work force. Conglomerates, for instance, can cross-subsidize funds between unrelated parts of the business and thus reduce the effect of a strike in any one part.

Occasionally, unions have sought to put pressure on nonstruck portions of a conglomerate or even a chain operation, but such action generally results in an injunction for violation of the secondary boycott provisions of section 8(b)(4) for engaging in a strike, or inducing others to strike or cease work, with an object of forcing one employer to "cease doing business" with another.⁴⁵ One might assume that one employer cannot "cease doing business" with another under section 8(b)(4) if both entities are essentially part of the same enterprise, that is, if the two nominally separate employers are really the *same* employer. The section, after all, explicitly does not bar a primary strike or primary picketing.⁴⁶ Yet, even unincorporated parts of a conglomerate are routinely declared to be nonallies, separate employers, or simply "neutrals."⁴⁷ Common ownership is not deemed a sufficient condition to free unions from the strictures of section 8(b)(4),⁴⁸ but the Board has never satisfactorily explained why.

To find such pressure to be lawful and primary, or to hold that the separate employers do not do business with each other, the Board requires "common control . . . denoting an actual, as distinct from merely a potential, integration of operations and management policies."⁴⁹ As in the "straight line" cases, the Board requires either integrated operations or common direction, or perhaps both.⁵⁰ Yet, common direction or control is obviously irrelevant to the interests the union seeks to advance.

The usual justification for such results is the need to confine the

45. See, e.g., *Miami Newspaper Pressmen's Local 46 v. NLRB*, 322 F.2d 405 (D.C. Cir. 1963) (union picketing at Detroit Free Press during strike at Miami Herald held secondary boycott despite common ownership of both newspapers by the Knight Newspaper chain).

46. See 29 U.S.C. § 158(b)(4)(ii)(B) (1982).

47. E.g., *American Fed'n of Television & Radio Artists v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972).

48. *Miami Newspaper*, 322 F.2d at 409 (actual common control plus common ownership is required).

49. *Id.*

50. See COLLECTIVE BARGAINING IN PRIVATE EMPLOYMENT, *supra* note 27, 735-38 for a discussion of the ally doctrine. In *Sears, Roebuck & Co.*, 190 N.L.R.B. 143 (1971), the

scope of economic conflict, but such a concern does not explain why the line is drawn at actual common direction or control. The argument that a line must be drawn somehow is an analytic cop-out, for it finesses the question why the line should be drawn at any specific point. The reliance upon an interest in containing labor conflict, like the concern for "stability" in the coordinated bargaining cases, masks more than it discloses. Regardless of how valid these interests may be, and they certainly radiate from the NLRA's policies, they are not an explanation for confining union attempts to equalize bargaining power.

This insulation from union pressure is difficult to understand when the union is merely seeking to counteract the power of a conglomerate or multi-operation firm. For instance, the analysis of firm-wide product boycotts used to aid a dispute that is technically limited to only one part of the firm raises similar questions, and the resulting attempts to limit the lawful range of union pressure suffers from logical deficiencies. The Board has, as in *Pet, Inc.*,⁵¹ sometimes avoided the power imbalance issue by broadly interpreting a proviso of section 8(b)(4).

Pet involved a primary strike against Hussman Refrigerator Company, a manufacturing division of Pet. In support of the economic strike, the union sought a firm-wide consumer boycott of other Pet products, and used advertising and handbills to gain consumer support.⁵² The Board held that such secondary boycott activity was protected under the publicity proviso of section 8(b)(4)(ii)(B)⁵³ of the Act, reasoning that the diversified corporate relationship between Pet and its other subsidiaries and divisions (the subject of the arguable secondary pressure), and Hussman (the subject of the primary dispute) was sufficient grounds for finding that Hussman was a "producer" of Pet's "products" that were the subject of the consumer boycott.⁵⁴

On appeal, the Eighth Circuit reversed the Board and held that

NLRB found that conditions under which independent contractor carpet installers install carpets sold by Sears does not give the union a legitimate interest in bringing direct pressure against Sears in an effort to combat substandard wages. *Id.* at 144.

51. 244 N.L.R.B. 96 (1979).

52. *Id.* at 99.

53. See 29 U.S.C. § 158(b)(4) (1982). This proviso protects "publicity, other than picketing" and thus protects only limited forms of secondary pressure. See also *Edward J. DeBartolo v. NLRB*, 103 S. Ct. 2926, 2932 (1983) (narrowly construing the publicity proviso to exempt only "publicity intended to inform the public that the primary employer's product is 'distributed by' the secondary employer").

54. *Pet, Inc.*, 244 N.L.R.B. 96, 101-02 (1979).

Hussman was not a "producer" under the publicity proviso.⁵⁵ The court found that the primary employer, Hussman, a subsidiary of the giant Pet conglomerate, had no "direct" relationship to "any specific product of Pet."⁵⁶ The court was able, therefore, to reject the following, real life, insight of the NLRB without any analysis:

Diversified corporations, by their very nature, are composed of operations which provide support for and contribute to one another. The contributions of each to the others may vary considerably. However, all add to the diversification which enables the enterprise as a whole to weather economic assault on any one of its operations. All contribute profits, either actual or potential, which enhance the value of the enterprise and foster its economic viability. All contribute a measure of good will.

* * * *

Hussman provides part of the diversification which contributes to the success of Pet and its other operations. Hussman's acclaimed high sales and earnings generate income which inures to the benefit of Pet and to Pet's effort to maintain its other subsidiaries. The goodwill earned by Hussman likewise enhances the reputation of all Pet operations. Consequently, Hussman variously contributes to the operation of Pet as a whole and to each of its subsidiaries and divisions and thus is a producer of all Pet enterprises products in the sense that "producer" is used in the proviso⁵⁷

Except for the above language from a now radically altered NLRB, the conglomerate, secondary boycott, and the coordinated bargaining cases reveal a reluctance to talk about power realities, let alone shifts in power. Indeed, the legal results of these cases solidify and protect existing economic changes.

The law's treatment, or avoidance, of power issues, however, reflects a general societal problem rather than one unique to labor law.⁵⁸ Our language tends to mask public as well as private power realities. The notion of "free" collective bargaining, like the law of contracts, gives the erroneous impression that the government does

55. *Pet, Inc. v. NLRB*, 641 F.2d 545, 549 (8th Cir. 1981).

56. *Id.*

57. *Id.* (quoting *Pet, Inc.*, 244 N.L.R.B. 96, 101-02 (1979)).

58. In contrast to labor law, the treatment of multi-jurisdictional enterprise in state taxation cases is considerably more realistic. In *Container Corp. v. Franchise Tax Bd.*, 103 S. Ct. 2933, 2945-46 (1983), the Court upheld, on constitutional grounds, California's formula of the total worldwide combined income of a MNC for purposes of the

not regulate relationships and that serious imbalances in private, economic power do not already exist. A theme that is often reflected in legal thinking is that, if there are no specific restrictions, somehow there is no regulation. Thus, if the NLRB deregulates its control of representation elections, this is not a regulation at all.⁵⁹ Deep in our consciousness is the notion that the market and the right to contract exist in some mythical free sense—outside of any political context—and furthermore, that the market does not favor particular groups.

II. COMMUNICATION AND CONCENTRATION

Power imbalances also affect the ability of labor and employees to communicate and express views, an area also influenced by capital concentration. This situation reflects two other current problems in society: the inability of certain views to find effective expression, resulting in the perception that certain views of the causes or remedies of social or economic ills are outside the allowable range of debate; and the insulation of certain geographical areas, such as shopping plazas or the workplace, from political discourse. The area of communication is interesting both because it is affected by the concentration of media power and because societal problems are again reflected by similar concerns in labor law.

Problems of concentrated economic power merge with

state's corporate income tax. The "unitary business" concept, used by many states, disregards the formal boundaries or divisions within an MNC and looks instead at economic realities.

Container Corporation owned or controlled 20 foreign subsidiaries between 1963-65. Most of the subsidiaries were in the same business as Container but they were relatively autonomous in relation to day-to-day management and personnel. Although the Court did not provide a clear standard for unitariness, it indicated that a number of relevant factors, including whether the subsidiaries and the parent were in the same line of business. The Court stressed that a prerequisite to a constitutionally acceptable finding of unitary nature is an exchange or sharing of *value*, not merely a flow of *goods* or funds. *Id.* at 2940. To this end, it is relevant "whether contributions to income [of subsidiaries] result[ed] from functional integration, centralization of management, and economies of scale." *Id.* at 2947 (quoting *F.W. Woolworth Co. v. Taxation & Revenue Dep't*, 458 U.S. 354, 364 (1982)). California could constitutionally consider the parent's providing assistance to obtain equipment, personnel, general guidance, technical assistance and in providing or guaranteeing loans, as relevant indicators of "unitary business." *Id.* See generally Casenote, 25 B.C.L. REV. 645 (1984).

59. Generally, states cannot enjoin or restrict federally unprotected activity because Congress intended such actions to be free of regulation. See *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 150-51 (1976). Yet, at the same time, federal law permits the most effective and deterring regulation, discharge.

problems of communication when a society either declares some areas off limits for economic or political discourse or makes those avenues open only to those with a deep pocket. Unions, for instance, face great problems in simply *reaching* employees and consumers. Increasingly, these objects of union communication are not found in freely accessible areas such as on sidewalks, streets, and public commons, but instead, are found in private shopping malls or industrial parks. This phenomenon, recognized for a brief, bright moment in *Logan Valley Plaza*,⁶⁰ has now been relegated to the Burger Court's dust bin.⁶¹

The shopping mall, for instance, is a *social* as well as an economic phenomenon, yet it is privately owned and carefully sterilized from political contacts, signs, pamphlets, and solicitation, all of which are presumed to be the hallmarks of a democratic society. It is a sanitized community and, at least with respect to the first amendment, kept free of controversy and spontaneity. By making access to malls and the media costly and difficult, recent decisions help guarantee that only the wealthy have the means to communicate.

Limitations on inexpensive means of communication have also undermined the ability of those less economically powerful to reach

60. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968) (peaceful picketing at privately owned shopping center is protected by the first amendment).

61. In *Hudgens v. NLRB*, 424 U.S. 507, 512-21 (1976), the Court held that the union had no first amendment right to enter a shopping center to publicize its strike. The Court stated that the case should not be decided on first amendment grounds, and remanded the case to the Board to be decided solely on NLRA statutory grounds. *Id.* at 521-23.

Although the first amendment no longer protects access to large shopping malls, state constitutions may provide more protection than the federal constitution. Indeed, states "may adopt reasonable restrictions on private property" so long as no provision of the federal constitution is violated. *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). The constitutions of 44 states protect speech in affirmative terms. See Macgill, *Anomaly, Adequacy, and the Connecticut Constitution*, 16 CONN. L. REV. 681, 684 (1984); Note, *Private Abridgement of Speech and the State Constitution*, 90 YALE L.J. 165, 180 n.79 (1980). Labor speech, however, may be subject to less state protection than nonlabor speech because of the NLRA preemption doctrine.

In addition, section 7 may be employed to protect employee economic picketing directed against an employer doing business in a shopping mall. See *Scott Hudgens*, 230 N.L.R.B. 414, 416 (1977); see also *Seattle First Nat'l Bank*, 243 N.L.R.B. 898 (1979); *Giant Food Markets, Inc.*, 241 N.L.R.B. 727 (1979). The odd result may be that unions are granted greater access rights and communication channels than are granted under the first amendment to other forms of political speech. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 579 (1972) (upholding prohibition on handbill distribution in a privately-owned shopping mall).

the public. Even the time-honored ability of groups to communicate by posting signs on public property can now be restricted on "aesthetic" grounds. In *Members of City Council v. Taxpayers for Vincent*,⁶² for instance, the Court held Los Angeles' interest in eliminating "visual clutter" to be sufficient to permit a total ban on posting signs, even political signs, on utility poles. Only a Court with no concept of existing economic inequality could state that the ordinance was "neutral . . . concerning any speaker's point of view."⁶³ All groups, it was no doubt assumed, had equal access to the print and electronic media. Justice Brennan in dissent, speaking for only two other members of the Court, aptly stated that this medium was "particularly valuable in part because it entails a relatively small expense in reaching a wide audience"⁶⁴ and is "essential to the poorly financed causes of little people."⁶⁵

The need to reach a wide audience is also seen in labor cases that increasingly deal with problems of union access to employees or to the public. Although the first amendment no longer applies in the labor context, there is seemingly little recognition of what is at stake. The effect on unions is only a part of a broader societal problem and reflects a number of trends that may have the result of *depoliticizing* the public.

In the area of workplace communication, for instance, the Court has distinguished between political and permissible economic behavior, that is, between proper union or employee behavior, on one hand, and political action on the other. Compulsory union shop fees, for instance, may only be used for the expenses of collective bargaining, but the scope of bargaining has been narrowed to *exclude* expenditures for political action.⁶⁶ Even more relevant is the

62. 104 S. Ct. 2118 (1984).

63. *Id.* at 2128.

64. *Id.* at 2137.

65. *Id.* (quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943)).

66. The Court has distinguished between activities that may be funded from compulsory membership fees (collective bargaining), and those that may not (political and non-bargaining activities). See *IAM v. Street*, 367 U.S. 740, 771-73 (1961); see generally Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981). The basis for this distinction between political and economic speech is unclear, as collective bargaining would seem to include political as well as private efforts. Compulsory union dues are considered a justifiable tax on employees who secure the benefits of union representation, yet representation need not be limited exclusively to collective bargaining activities, and, indeed, such a view would be a denial of traditional union behavior. The statutory basis for the distinction is dubious since compulsory dues for bargaining goals are just as compulsory as forced dues for political goals.

In *Lathrop v. Donohue*, 367 U.S. 820, 827 (1961), decided the same day as *Street*, the Court affirmed without opinion that the compulsory Wisconsin State Bar dues,

doctrine that empowers employees to communicate with other employees at the workplace, but only so long as the communication is not "purely political."⁶⁷ If "purely political," the speech is outside the protective ambit of section 7, and thus, the employee's activity will no longer be protected from employer retaliation. The workplace, like the shopping mall, is apparently not to be opened up to matters too far from the purposes of the enterprise. Yet it is clear that some union speech will be protected by section 7 even though it is "political" in some sense and even though it deals with matters beyond the control of the particular employer.⁶⁸ The line between statutorily protected expression and that which is "purely political" is not easily determined. The predictable result is a series of incoherent and poorly reasoned decisions because there can be no rational standard for determining when speech is "too attenuated" from the concerns of employees as employees. Why is an attempt to urge workers to strive for an independent labor party, instead of supporting existing political parties, "purely political"?⁶⁹ This

which were used in part for political purposes—"influencing a broad range of legislation and public opinion"—did not violate the first amendment. For an argument that unions should be granted fuller rights of expression than governmentally created organizations such as a state bar, see EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 684-95 (1970).

The recent Supreme Court decision in *Ellis v. Board of Ry., Airline & S.S. Clerks*, 104 S. Ct. 1883 (1984) compounds the problem by holding that "[u]sing dues exacted from an objecting employee to recruit members among workers outside the bargaining unit can afford only the attenuated benefits to collective bargaining on behalf of the dues payer," and that such organizing expenses cannot be charged to objecting employees. *Id.* at 1894. The decision narrows the justifiable interests of the worker community and may significantly decrease union power as well.

Ellis clearly parallels *Plant v. Woods*, 176 Mass. 492, 57 N.E. 1011 (1900) in which the Massachusetts Supreme Judicial Court held that the closed shop is not "directly" related to working conditions. See also J. ATLESON, *supra* note 2, at 69 (discussing *Plant*). The concept that compulsory dues should not be spent for political purposes should be contrasted with the unleashing of corporate wealth to affect political opinion. See *infra* text accompanying notes 76-80.

67. *Eastex v. NLRB*, 437 U.S. 556, 565-70 (1978); *United Autoworkers v. NLRB*, 645 F.2d 1151, 1155 (D.C. Cir. 1981).

68. See generally *Eastex*, 437 U.S. 556 (1978) (union permitted to use its newsletter to express opposition to state "right to work" statute, to criticize presidential veto of an increased federal minimum wage, and to urge employees to register to vote).

69. *Ford Motor Co.*, 221 N.L.R.B. 663, 666, *enforced*, 546 F.2d 418 (3d Cir. 1976). Similarly, a "political" leaflet that announced a rally on behalf of a Mexican student leader seeking asylum in the United States, distributed by employees on a public street, was recently deemed unprotected by the NLRB general counsel. The Mexican national had apparently become a trade unionist in the United States and the leaflet stated that the speech rights of all foreign-born political and union activists were at stake. *Eagle Elec. Mfg. Co.*, 114 L.R.R.M. (BNA) 1284-85 (advice memo 1983).

question precisely raises the issue of definition of the worker community since the normally applicable statutory standard is whether the speech or activity is for its "mutual aid or protection."⁷⁰

This limitation on the content of workplace speech is important for two reasons. First, the separation of allowable speech from that which is political relates directly to one of the most important dichotomies in legal thought: the public/private distinction. The political/economic or public/private distinction is a hallmark of liberal thought affecting not only labor law⁷¹ but American thought in general. As Karl Klare has convincingly noted:

The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way. The core ideological function served by the public/private distinction is to deny that the practices comprising the private sphere of life—the worlds of business, education and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law. Denying the role of politics—the processes by which communities organize and institutionalize their self-directive capacities—in constituting the forms and structure of social life is a way of impeding access to an understanding of the role of human agency in constructing the world. The primary effect of the public/private distinction is thus to inhibit the perception that the institutions in which we live are the product of human design and can therefore be changed.⁷²

The distinction is especially odd since labor relations and collective bargaining are regulated by law; any notion of "free" collective bargaining is a typical American myth. For instance, when *public purpose*

70. *Eastex*, 437 U.S. at 564-68 (construing 29 U.S.C. § 157 (1982)).

71. See Hyde, *supra* note 66, at 33. Another example is *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702 (1982). The Court initially confronted the issue whether a union's refusal to load cargo on American ships bound for the USSR was a "labor dispute" within the Norris LaGuardia Act and, thus, nonenjoinable. The Court held that a labor dispute did exist, even though the dispute was seemingly aimed at political, not economic, objectives. Not surprisingly, the Court did not hold that the politically motivated labor boycott was a "labor dispute" as such; instead, the Court held that the "labor dispute," which engaged the Norris LaGuardia Act's restrictions, was the "contract dispute" concerning whether the work stoppage violated the no-strike clause in the union's collective agreement. *Id.* at 709-12. Again, the Court attempted to separate economic and political actions.

72. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1983) (footnotes omitted).

is used as the rationale for condemning Detroit's Poletown to build a General Motors' plant or for giving public funds at minuscule interest rates (with tax concessions to boot) to a hotel chain for a hotel in a depressed area, the public/private distinction has lost all meaning.⁷³ The intellectual evaporation of these distinctions is common stuff to my colleagues in tax and local government law, but is not too common in the labor law world.

Second, the "political speech" doctrine is yet another example of how neutral sounding principles operate in nonneutral ways. The limitations on the *content* of employee speech in the workplace are especially ironic at a time when corporate speech, what we used to call "commercial speech," is rapidly becoming equated with political speech and thus given the full protection of the first amendment.⁷⁴ Employees cannot communicate about political matters at the most convenient place, the workplace, yet corporate wealth is permitted to be used to persuade the public on political matters. At the same time, picketing, a crucial form of expression and persuasion for unions, is not treated as speech even though the new commercial speech cases make the legal view of picketing incoherent.⁷⁵ Although picketing and workplace speech may eventually be equated with commercial speech, the prognosis for such equality is not good.

In *First National Bank v. Bellotti*,⁷⁶ for instance, the Court invalidated a state statute restricting the use of corporate funds to influence a state referendum, but failed to acknowledge the corporate

73. As Klare perceptively notes, the unions' public role justifies the collection of dues via union shop clauses, but the "public" function is also employed to *bar* the expenditure of such funds on political uses to which dissenters may object because such matters are presumably private. *Id.* at 1376-78. The manipulability of the distinction is revealed by reaching the same result by treating the compulsory collection of dues as a private matter, only tolerated by public law, but by treating political activities as necessarily public. *Id.* at 1378-79.

74. See, e.g., *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (invalidating Massachusetts statute restricting the use of corporate funds to influence outcome of a state referendum). Prior to 1975, regulation of commercial speech was accorded only minimal scrutiny by the courts and corporate standing to raise free speech issues, other than by the press, had not been established. See Note, *The Corporation and the Constitution: Economic Due Process and Corporate Speech*, 90 YALE L.J. 1833, 1852 n.107 (1981).

75. Peaceful picketing has traditionally been given the status of economic activity, an activity that involves more than speech, but this doctrine should be "reexamined, particularly in light of more recent developments giving full First Amendment protection to non-labor picketing and substantial First Amendment protection to commercial advertising." Note, *Labor Picketing and Commercial Speech: Free Enterprise Values in the Doctrine of Free Speech*, 91 YALE L.J. 938, 938 (1982).

76. 435 U.S. 765, 784-85, 795 (1978).

character of the speaker. Instead, the Court focused upon the rights of individual listeners, an approach ignored by the Court in cases of access to the workplace by nonemployee organizers.⁷⁷ The Court's view of formal equality in *Bellotti* meant that banks and individuals must be treated alike for first amendment purposes, despite the greater ability of the former to affect political decisions. *Bellotti* is related to *Buckley v. Valeo*,⁷⁸ a case that effectively shields the wealthy from congressional attempts to limit their effect on the electoral process.⁷⁹ Taken together, the two decisions drastically limit legislative authority to regulate the "extent to which concentrated economic power can be translated from the private into the public sphere."⁸⁰

77. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956) (employer not obligated to permit nonemployee organizers onto company property unless employees are "beyond the reach of reasonable union efforts to communicate with them").

78. 424 U.S. 1 (1976) (per curiam). The Court upheld statutory limitations on individual contributions to political campaigns, but held that the restrictions on independent expenditures were an unconstitutional restraint on the right to political expression and invalidated the limit on expenditures for political office by candidates. *Id.* at 29, 51, 58-59.

79. For a more limited interpretation of *Buckley*, see Blum, *The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending*, 58 N.Y.U. L. REV. 1273, 1354-69 (1983).

80. See Note, *supra* note 74, at 1855. The effect of *Bellotti* and *Street* is that corporations can make political contributions regardless of the opposition of the dissenting shareholders, whereas unions cannot use their union shop funds for political purposes. Similarly, rate payers may be forced to subsidize advocacy of political positions by public utilities. Compare *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 535 (1980) (New York Public Service Commission's prohibition on public utilities including public policy statements in monthly bills violates the first amendment), with *City of Boston v. Anderson*, 376 Mass. 178, 182-83, 380 N.E.2d 628, 632 (1978), *appeal dismissed*, 439 U.S. 1060 (1979) (State law was held to prohibit municipal advertising expenditures in support of a referendum to expand the state's tax base by increasing the assessments of business property; the city unsuccessfully argued that as an association of citizens it had a first amendment right to speak.).

That the Court equates spending money with protected speech is made crystal clear by the recent *Federal Election Comm'n v. National Conservative Political Action Comm.*, 53 U.S.L.W. 4293 (1985). The Court declared invalid § 9012(f) of the Presidential Election Campaign Fund Act, which makes it a criminal offense for an independent political committee to expend more than \$1000 to further the election of a presidential candidate who has accepted public financing of his general election campaign. *Id.* at 4294. In writing for the majority, Justice Rehnquist noted, "There can be no doubt that the expenditures at issue . . . produce speech at the core of the First Amendment." *Id.* at 4297. Moreover, he noted that forbidding expenditures in excess of \$1000 "is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system." *Id.* The majority saw corruption as the only, apparently valid, governmental interest that might justify such an expenditure limit, but narrowly viewed corruption of the political process as merely the use of expenditures as "a *quid pro quo* for improper commitments from the candidate." *Id.* at 4298. Finally, the Court held that the statute was overly broad since it applied not only

These developments are part of the larger problem of the increasing concentration of control over the avenues of communication. Television and the press are prime means of communication, but these avenues are accessible only to those groups able to reach into deep pockets, and the law increasingly protects these privately controlled voices from public accountability.⁸¹ The media itself is controlled by a handful of persons who have similar viewpoints, and, increasingly, a smaller handful. But for the media, "in fewer hands," is a short-handed and somewhat misleading phrase, for the concern is not fewer owners as such, but fewer owners with *similar* values. Diverse ownership rules of television outlets, for instance, will not guarantee a diversity of outlooks. The problem is serious because the media is a primary force in determining the significance of events and the bounds of political discourse. For example, the "electronic village" of Marshall McLuhan is certainly a very special kind of village where (1) politics focuses on individuals rather than issues (Will Stockman or Meese survive? Will Ferraro help or hurt the Democratic ticket?) and (2) which defines the political spectrum as that space between say, William Buckley and Arthur Schlesinger, that is, between the far right and the near left.⁸²

to wealthy PACs such as NCPAC, but also to "informal discussion groups that solicit neighborhood contributions to publicize their views about a particular Presidential candidate." *Id.*

As Justice White stated in dissent, expenditures produce speech but "they are not speech itself." *Id.* at 4301 (White, J., dissenting). For the majority, however, money talks. Groups *without* funds may be barred from posting political messages on utility poles or from reaching the public in places like shopping malls. Access to the public on public issues, therefore, is protected when one has the funds to do so but not when one has little funds to spend.

81. Thus, changes in licensing and renewal rules at the FCC ignore the public role of licenses but favor private accumulation. In addition, increasing mail rates drastically affects the viability of small publications.

The growing control of the media by the private sector has largely been overlooked. Americans, especially civil libertarians, have predominantly been concerned with the harmful effects of *governmental* rather than private regulation of communication. Marc Yudof, in his recent book, for instance, is concerned with the power of government to control or restrict vital information but is not at all concerned with the effects of such power in private hands. M. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA* 95-103 (1983). See Carter, *Technology, Democracy, and the Manipulation of Consent* (Book Review), 93 YALE L.J. 581, 584-90 (1984), for a trenchant criticism.

82. As the IAM's recent investigations found, unions and workers are generally not seen on television, except when included in news broadcasts because of strikes or corruption charges. This absence of labor coverage is also reflected in the schools, which are increasingly adopting corporate-designed teaching programs. A pamphlet sent to thousands of classrooms by the Wheelabrator-Frye corporation for use in teaching young children about economics states:

The perception of constricted discourse in America is not new, but it now seems to extend to almost all areas of political life.⁸³ The narrowing of discourse is nowhere clearer than in discussions of investment decisions and control of capital. Both the media and the courts tend to agree that capital must be able to move freely, unhampered by the employee community or the needs of the general community.⁸⁴ In labor cases, courts increasingly stress that society

In Sunny Village, everybody works in a bakery making bread that sells for 50 cents a loaf. The workers want twice as much pay. To pay them, the baker raises its PRICE to \$1 a loaf That's INFLATION. But if the workers baked twice as much bread, they could get higher PAY, and the PRICE of bread wouldn't go up.

WHEELABRATOR-FRYE, INC., *THE MONEY MACHINE, AN ANNUAL REPORT FOR YOUNG PEOPLE* (1980).

The notion that there is no competition for profits, and, that therefore higher profits result in higher wages, seems a timeless American belief. *Cf.* *Vegalahn v. Guntner*, 167 Mass. 92, 98-100, 44 N.E. 1077, 1077-78 (1896) (picketing employer's premises to force higher wages held to be intimidation and a private nuisance); 3 J. COMMONS & E. GILMORE, *A DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 59-248 (1910) (accounting the trial of the Philadelphia Cordwainers on an "Indictment for a Combination and Conspiracy to Raise their Wages"). Groups such as the Chamber of Commerce, NAM, Free Enterprise Institute, as well as individual corporations like Exxon, Standard Oil, AT&T and Amway spend large amounts on "educational" material to influence views of school children. These materials are often used by schools with budget problems. Rosenbluth, *Are Your Kids Being Taught What the Boss Wants Them to Think*, *UAW SOLIDARITY*, Feb. 1-5, 1984, at 11, 11, 12.

Also serious are the biases found in textbooks and programmed teaching material, the latter often produced by the same corporations. Unions are usually excluded, union leaders are slighted compared to industrialists, and labor history is routinely ignored. The problem here is the sustained process of suppressing the existence of other communities with different social or cultural values.

83. Recently, Professor Richard Falk of Princeton commented on the limited range of permissible discussion about issues of national security and weapons policies. Various people (he lists Harold Hughes, Eugene McCarthy, George McGovern, Fred Harris and Jerry Brown)

were discredited and effectively destroyed as national political leaders. Victims of subtle but assured media assassination, they were deprived of "credibility" by the reigning network of Pentagon and CIA experts in and out of government, TV anchors, editorial writers for the influential newspapers and weeklies, and prestigious intellectuals, who together set the terms of debate. That "invisible government" shapes and stifles the competition for political office by policing the boundaries of "reasonable" dissent, a code for political discussion that does not threaten the permanent bureaucracy's control over national security policy.

Falk, *What the Democrats Are Saying*, *NATION*, May 5, 1984, at 546.

Moreover, Falk adds in language eerily echoing mine, but here referring to political campaigns and media shaping, that "when the basic policies and principles of governance are outside the bounds of public discourse, personality traits become the natural focus." *Id.* at 546-47.

84. See generally J. ATLESON, *supra* note 2, at 160-70 (1983).

needs a free flow of capital⁸⁵ uninhibited by employee interests or community concerns. It may be that industries, like human beings, have an effective life cycle—that once capital investment is large and in place, industries no longer continue to invest or have the internal vigor to keep apace of new technology. The facts suggest, however, that other causes of decline also exist.

The steel industry, to pick one noteworthy example, achieved a *competitive* rate of profit only once in the past twenty-four years. Its profits, until recently, averaged a return of approximately seven or eight percent on stockholders' equity, although profits have exhibited a long run tendency to decline. Even so, such profits are low compared to manufacturing profits, which have averaged a twelve to fifteen percent profit rate, a rate that has steadily increased over the past twenty-four years. Nevertheless, by world standards, a seven percent return on steel is almost unheard of. Among the most profitable foreign steel companies, Japan averages two percent; West Germany barely makes three percent.⁸⁶ The United States steel industry, at least until recently, has been one of the *most profitable* in

85. See, e.g., *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 680-86 (1981). In *First Nat'l Maintenance*, the Court held that there was no duty on the part of the employer to bargain over its decision to terminate a contract that comprised part of its business. The Court stressed the employer's need for unfettered economic decisionmaking. See also *NLRB v. Bildisco & Bildisco*, 104 S. Ct. 1188, 1197-99 (1984) (debtor-in-possession in bankruptcy proceedings can unilaterally reject or modify collective bargaining agreement); *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287-91 (1972) (successor employers are not bound by substantive provisions of collective bargaining agreement negotiated by predecessors); *Milwaukee Spring*, 268 N.L.R.B. No. 87 (1984) (employer not obligated to gain union's consent to relocate assembly plant when nothing in the collective bargaining agreement so stipulated).

86. In a 1977 study comparing profit rates among the steel industries of the United States, Japan, and the European Community, the Federal Trade Commission found that for the period 1961-1971 the United States had the highest profit rate, Japan the second highest, and the European Community the lowest when profit was measured by net income as a percentage of sales. When profit was measured by net income as a percentage of equity, the profit rates of the United States and of Japan were approximately equal, and the European Community was again the lowest. BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, *THE UNITED STATES STEEL INDUSTRY AND ITS INTERNATIONAL COMPETITORS: TRENDS AND FACTORS DETERMINING INTERNATIONAL COMPETITIVENESS* 504-05 (1977). In 1980 Congress' Office of Technology Assessment reported that in the period 1969-1977 net income as a percentage of net fixed assets in five major steel-producing countries was:

United States	6.7
Japan	1.7
West Germany	2.9
United Kingdom	-5.3
France (1972-1976)	-8.3

OFFICE OF TECHNOLOGY ASSESSMENT, *TECHNOLOGY AND STEEL INDUSTRY COMPETITIVENESS* 126 (1980).

the world.⁸⁷

In 1977, however, the steel industry reached its lowest profit rate since World War II, 0.1 percent. In the next three years, the industry eliminated 8.4 million tons of capacity and there have been greater reductions since.⁸⁸ The resulting devastation to labor and the economy is obvious. Associated layoffs eliminated 70,000 jobs and ravaged regional and local economies. When the industry sought help, the union lined up with it to seek federal aid without obtaining independent analysis of the problem or exploring alternative remedies.

The official line is that the steel industry must seek governmental aid to increase profits. The profits will purportedly be used for desperately needed modernization that cannot be achieved now because profits are too low and the industry cannot borrow enough to overcome over thirty-five years of poor planning. Typically, the villain is often held out to be the steelworker, even though the industry is capital intensive and, since World War II, United States steel firms have lagged significantly in actual capital investment.

Ironically, the United States steel industry has not only been a leader in profits world-wide and a pacesetter in labor productivity, but it is also the leader in technical innovation,⁸⁹ even though these advances were more quickly adopted elsewhere than at home because investment outside the United States is less dependent upon immediate profit returns. In other countries substantial portions of the steel industry, ranging from ten percent in West Germany and

87. Metzger, *Heavy Metal* (Book Review), *WORKING PAPERS*, Mar./Apr. 1982, at 60, 62.

88. "Between 1977 and 1984, the overall capacity of the steel industry fell by 16 percent." Devens, Leon & Sprinkle, *Employment and Unemployment in 1984: A Second Year of Strong Growth in Jobs*, 108 *MONTHLY LAB. REV.* 3, 10 (1985).

89. The use of technology is another limitation on the options, providing one more parallel between problems in society and in labor relations. The decreasing zone of privacy in everyday life is apparent in the workplace, since technology is available to restrict our freedom to act unobserved. Unions, however, have only belatedly begun to deal with the effects of automation. Since the early days of the Ford plant, there has been an effort to regulate the work effort of employees by the use of technology. See generally J. ATLESON, *supra* note 2, at 103-07; Noble, *Social Choice in Machine Design: The Case of Automatically Controlled Machine Tools*, in *CASE STUDIES ON THE LABOR PROCESS* 18 (A. Zimbalist ed. 1979). The new technology does more; it is now often possible to collect data on what employees do every second of their work day, instantaneously. Technology often enlarges management control and surveillance of the entire labor process. In a continuation of a long historical pattern, workers at video screens are denied a grasp of the entire work process of which their work is only a part and, commonly, are also denied social contact with co-workers. Yet we tend to believe that technology is neutral, involving no social choices, a naive, but amazingly powerful belief, which drastically limits the range of allowable views.

Canada to sixty to seventy percent in most of Europe, are government owned. In Japan, the industry is supported indirectly through the government's informal control over the banks. In these countries, steel is not expected to make competitive profits, and the industry must be subsidized in order to provide low priced steel for domestic manufacturing.

Should we take over U.S. Steel? It already has the right name! In the United States, however, such possibilities are not discussed. I do not know whether other arrangements are either feasible or workable, but my point is that discussion of other kinds of economic arrangements, even though they exist in other capitalist countries, tends to be outside the range of permissible political discourse in the United States. Again, the spectrum of political debate in the United States is extremely narrow.

The labor movement itself suffers directly from the limited spectrum of political discourse. The ossification of the labor movement has long been a staple of writing on the left; the writers generally stress the costly effects of the removal of militant unionists from positions of influence in the 1950's. I have always been somewhat doubtful of this argument, but it is true that alternative visions have not been considered. The problems of labor, I think, stem not so much from the expulsions of unions or radicals in the 1950's, but rather from the troubling (but still understandable) trade-offs that were made in World War II to favor bureaucracy and integration instead of rank and file militancy,⁹⁰ and much earlier, from the failure of the Knights of Labor, the last large scale attempt to challenge the wage labor system on the basis of traditional, republican values. These events may help to explain why labor itself has generated so few ideas about the solutions to industrial decline, and why Douglas Fraser and the late Lloyd McBride often sounded like Lee Iacocca and other presidents of the automobile and steel companies.

III. ECONOMIC POWER AND LAW

The existence of "big labor" has always been a myth. Power, as sociologist Alvin Gouldner has eloquently argued, tends to manufacture its own legitimacy, engendering social norms, values, beliefs,

90. See generally N. LICHTENSTEIN, *LABORS' WAR AT HOME: THE CIO IN WORLD WAR II* 5-6 (1982) ("Home-front pressures for social order and political orthodoxy during World War II did much to weaken the independence and shop-floor power that the industrial union had won in the late 1930s.").

and expectations that inhibit major challenges to dominant institutions and resources.⁹¹ This tendency has critical implications for industrial relations. As Alan Fox has noted, the stability of collective bargaining (and its host economic system) rests on the willingness of workers and unions to

accept as given those major structural features which are crucial for the power, status and rewards of the owners and controllers. It is because this condition is usually fulfilled that owners and controllers are rarely driven to call upon their reserves of power in any overt and public exercise. Only the margins of power are needed to cope with marginal adjustments. This, then, is what accounts for the illusion of a power balance. Labour often has to marshal all its resources to fight on these marginal adjustments; capital can, as it were, fight with one hand behind its back and still achieve in most situations a verdict that it finds tolerable. What many see as major conflicts in which labour seems often now to have the advantage are conflicts only on such issues as labour deems it realistic to contest, and these never touch the real roots of ownership, inequality, hierarchy, and privilege. Only if labour were to challenge an essential prop of the structure would capital need to bring into play anything approaching its full strength . . .⁹²

One has to add that the superior power of capital is also unleashed when reduced profit margins force management to limit the one aspect of production over which it has historically had most control—labor. Labor can be controlled and intimidated by capital's threats to move or close enterprises.

Corporate reorganizations, mergers, and large purchases have burdened companies with huge debts and the result is that companies are likely to attempt to make employees bear some of this debt through concessions. Moreover, a good recession does discipline the work force. But not always. When facing competition from abroad or from other areas in the United States, employers in the nineteenth century routinely increased hours or cut back wages. Labor's reaction, however, has often been different from the concessionary tendency of the 1980's. Most of the great nineteenth century disputes, including Homestead, the railroad strikes of 1877, and the Pullman strike and subsequent boycott, were examples of resistance to cuts in benefits or concessions. In an era of collective

91. A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* 293-94 (1971).

92. A. FOX, *BEYOND CONTRACT: WORK, POWER & TRUST RELATIONS* 279-80 (1974).

bargaining, and in industries with well entrenched unions, however, concessions have been granted, often prior to the termination dates of their agreements.

There is a belief that the effect of concessions bargaining has been overstated, and that union gains will exceed losses once the economy recovers from the latest recession and regains steam. Some unions, for instance, gained some access to detailed information about company operations, some involvement in management decisions, and some employment guarantees. Only the future can answer whether some important gains were made or whether even these items will be traded back for monetary items.⁹³ The concession period, however, may be one sign that the post-war consensus is ending.

Economic growth since the end of World War II has required general industrial peace and has "promised to generate the material basis for sustaining it by raising workers' standard of living."⁹⁴ In earlier times, collective bargaining seemed sufficient to limit conflict and otherwise respond to the goals of the Wagner Act.⁹⁵ During periods of crisis, however, unions have been forced into defensive postures. Following World War II, unions were tied to the economic system by the concept of "growth," meaning economic accumulation.⁹⁶ Growth became, after the war, "a political program, a guide to action for social and business unionists alike."⁹⁷ Unions were thus tied to federal programs that supported foreign policies "aimed at protecting markets for American goods and capital abroad, fiscal and monetary policies that promoted capital investment at home, and technological innovations that raised worker productivity"⁹⁸ This is what Stanley Aronowitz calls the "discourse of growth";⁹⁹ it became the basis for the compromise between labor and capital—the heart of the new social contract. Employers' acceptance of collective bargaining was only grudging,

93. See generally Olson, *Keeping Capital and Jobs at Home*, 8 NOVA L.J. 583 (1984). See also Capelli, *Concession Bargaining and the National Economy*, 35TH ANN. PROC. OF THE IRRA 362 (1982); Kassalow, *Concession Bargaining—Something Old, But Also Something Quite New*, 35TH ANN. PROC. OF THE IRRA 372 (1982).

94. B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 133 (1982).

95. *Id.* at 135.

96. S. ARONOWITZ, *supra* note 3, at 98.

97. *Id.*

98. *Id.* at 99.

99. *Id.* at 98.

based in part on a perception that cooperation of unions was useful only to maintain "stable" and disciplined labor relations.

What may have changed is not so much the rejection of this belief but the assumption of continued economic growth on which it was founded.¹⁰⁰ The new international competition, most well known in steel and automobiles, destroyed that assumption. I would suggest that what we are viewing is not simply the relative weakening of unions and collective bargaining, but in a real sense, we may be more clearly perceiving that unions have always lacked effective, countervailing power. And with the end of the post-war consensus, employers have begun to assert the power they have always possessed in relation to unions. The actual balance of power was masked in the post-war period by a social compact in which unions, as well as employers, stressed economic growth and supported sympathetic governmental policies. A long term view would suggest that union power has always been exaggerated and that the labor laws were often interpreted as if there were no imbalance of power.

Issues of power are often hidden in the very way we talk about law. Although I am reluctant to give excessive weight to split Supreme Court opinions, it makes some sense to see recent decisions as flowing from a specific historical context.¹⁰¹ Focusing only on two cases, *First National Maintenance*¹⁰² and *Bell Aerospace*,¹⁰³ one could argue that a majority of the Court is ready to end the post-war consensus that involved the use of the Act as a cooptive or institutionalizing device. The decision in *Bell Aerospace*, to exclude vaguely defined "managerial" employees from the scope of the NLRA,¹⁰⁴ removes the possible protection of the statute (as well as its strictures) from hundreds of thousands of employees. It is as if "managerial" employees are unlikely to strike and cause the kind of economic dislocation referred to in the statute's preamble, and, therefore, we need not include them within the Act.¹⁰⁵ Thus, the

100. *Id.* at 173.

101. See generally K. Klare, *The Bitter and the Sweet: Reflections on the Supreme Court's Yeshiva Decision*, *SOCIALIST REV.*, Sept./Oct. 1983, at 99, 105.

102. *First Nat'l Maintenance v. NLRB*, 452 U.S. 666 (1981). See *supra* note 85.

103. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283-84 (1974) (holding that Congress intended to exclude from the protection of the NLRA all employees properly classified as "managerial," not just those in positions susceptible to conflicts of interest in labor relations).

104. See J. ATLESON, *supra* note 2, at 173.

105. But see *Ford Motor Co. v. NLRB*, 441 U.S. 488, 503 (1979), in which in-plant cafeteria food prices were held to be a mandatory subject of bargaining. Although the issue is obviously of lesser importance to employees than job termination and partial

cooptive or integrative potential of the NLRA is less essential. In addition, in *First National Maintenance*, the Court favored the interest of capital mobility over the dangers of disruption as well as the loss of employees' job interests. These cases may presage the end of the period of alleged "consensus" and the beginning of another era that began with rejecting the Labor Reform Act and the destruction of PATCO. But this could only occur in a society that supported such actions, one that chooses capital protection and mobility over other equally legitimate concerns. Again, the state of the law may in part reflect the lack of union power as much as have an impact upon it. It is quite possible, therefore, to think of life and law as existing in a dialectical relationship.

IV. CONCLUSION

The increased concentration of capital adversely affects labor in many ways. The ability of workers to bargain more effectively, a goal of the NLRA, has been circumscribed and their ability to place economic pressure upon large, diversified corporations has been limited. Workers' ability to communicate and express their views has been curtailed, even while the protection accorded corporate speech is becoming increasingly broad. In light of these developments, it is time to address these social and economic disparities in power.

Changes in capital and corporate structure (as well as changes in managerial views about the values of institutionalizing conflict through collective bargaining) may be far more influential than the obstacles to union efforts created by current decisions of the Supreme Court or the current NLRB. Indeed, it is quite possible that the current legal situation may be as much of a reflection of a growing imbalance of power as a causative factor. After all, the recent decisions do not exist in a vacuum. Concededly, union power probably has declined after recent decisions of the Board and the Supreme Court. But the law may also mirror the defensive posture of unions as they respond to a strong managerial attack, caused in part by international competition and the recognized failure of large sectors of American enterprise, like the steel industry, to modernize adequately through the reinvestment of profits.

closings, the Court noted that employees had boycotted the cafeteria, and, thus, stressed that it was important to sweep food prices into §§ 8(a)(5) and 8(d) to avoid labor conflicts! *Id.* at 498-501.

The belief that law is a rational, almost ahistorical system, a belief which is reflected in most legal writing, means that historical context is rarely discussed. It is as if the decisions of the late 1930's, 1940's, and 1950's were unaffected by the surge of the CIO, the second world war, and, finally, the post-war reassertion of managerial prerogatives and control. The result is to hide not only underlying values, but power relationships as well. It is time to reexamine existing power relationships and the goals of federal labor policy.